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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1891.

No. ~~556~~. 220

WILSON N. JONES, PLAINTIFF IN ERROR,

vs.

ADOLPH BAER, SIMON SEASONGOOD, AND LEWIS BIERMAN, PARTNERS UNDER THE FIRM NAME AND STYLE OF BAER, SEASONGOOD & CO.

IN ERROR TO THE UNITED STATES COURT FOR THE INDIAN TERRITORY.

FILED OCTOBER 18, 1889.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JULY 17, 1891.

1 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judge of the United States court for the Indian Territory, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said United States court, before you or some of you, between Adolph Baer, Simon Seasongood, and Lewis Bierman, partners in trade doing business under the firm name and style of Baer, Seasongood & Co., as plaintiffs, and Wilson N. Jones, as defendant, a manifest error hath happened, to the great damage of the said Wilson N. Jones, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the 29th day of July, in the year of our Lord one thousand eight hundred and eighty-nine.

WM. NELSON,
Clerk of the United States Court for the Indian Territory.

Allowed by—
JAMES M. SHACKELFORD,
Judge U. S. Court for the Indian Territory.

2 UNITED STATES OF AMERICA, *Indian Territory,* } *ss:*

Be it remembered that at a special called session of the United States court for the Indian Territory, begun and holden at the court-house, in the town of Muscogee, in said Indian Territory, on the 3rd day of June, A. D. 1889, held in pursuance of a call made by the Honorable James M. Shackelford, sole judge of said court, on the 5th day of April, A. D. 1889, and published for three weeks consecutively before the first day of said special term of said court, in the "Muscogee Phœnix," a weekly newspaper of general circulation printed and published in said town of Muscogee, in said Indian Territory, there were present the Honorable James M. Shackelford, sole judge thereof; William Nelson, Esqr., clerk of said court; Thomas B. Needles, Esqr., United States marshal for the Indian Territory, and Zachary T. Walwood, Esqr., United States attorney for said court, — that the following proceedings, among others, were had:

3 Be it remembered that heretofore, to wit, on the 20th day of May, A. D. 1889, Adolph Baer, Simon Seasongood, and Louis Bierman, partners doing business under the firm name and style of Baer, Seasengood & Co., filed in the clerk's office of said court their certain complaint, in writing, against one Wilson N. Jones, and which complaint is in the words and figures following, to wit:

In the United States Court for the Indian Territory.

BAER, SEASONGOOD & Co.
vs.
W. N. JONES. } Complaint at Law.

The plaintiffs, Adolph Baer, Simon Seasongood, Lewis Bierman, doing business in the firm name and style of Baer, Seasongood & Co., at St. Louis, Mo., & residents of St. Louis, Mo., state that the defendant, W. N. Jones, of the Choctaw Nation, I. T., is indebted to them in the sum of two thousand six hundred and fourteen dollars and nineteen cents, together with interest thereon at the rate of 10 per cent. per annum from the 6th day of May, 1889, for goods and merchandise sold and delivered by the plaintiffs to the defendants, particulars of which are set out in the account filed herewith, together with the credits to which the defendant is entitled, and leaving due and unpaid the sum above mentioned, with interest as aforesaid; wherefore they pray judgment for two thousand six hundred and fourteen dollars and nineteen cents, together with
4 the interest at the rate of 10 pr. cent per annum from the 6th day of May, 1889, and for other relief.

DUVAL, CRAVENS & TEMPLE,
Att'ys for Pl'ff-.

Copies of the Accounts Filed with said Complaint and Referred to in said Complaint.

ST. LOUIS, *May 6th*, 1889.

Mr. W. N. Jones, Caddo, I. T., bought of Baer, Seasongood & Co., manufacturers and jobbers of clothing, 616 Locust street.

S. B. folio.
Sold by Mr. Martin.
Terms: 6–10, 5–30, or 4 mos. net.

Duplicate.

September 22, 1882.

4287	6 suits,	3.50	21 00
4286	6 "	3.75	22 50
4285	6 "	3.75	22 50
4701	3 "	7.50	22 50
4702	3 "	7.50	22 50
4351	4 "	all 8.00	32 00
"	2 pants "	2.50	5 00

4330	3 suits all	10.50	31 50
4336	5 " "	10.50	52 50
4675	3 "	13.50	40 50
3616	3 " "	13.50	40 50
5208	2 pants all	4.50	9 00
4651	2 " "	4.50	9 00
4459	6 y'ths' suits "	6.25	37 50
8501	6 " "	7.00	42 00
4099=3 98=3	6 boys' coats,	1.25	7 50
Box. & drayage			1 25
			419 25

5 October 5, '82.

4439	6 suits,	5.00	30 00

Oct. 16, '82.

4701	2 suits, all	7.50	15 00
4701	1 p. & vest, "		3 50
4702	3 suits, "	7.50	22 50
"	1 c. & vest,		6 25
4440	6 coats,	3.75	22 50
3837	6 pants,	2.25	13 50
3671	4 "	2.75	11 00
4414	1 " all		3 00
4682	1 " "		2 25
4620=2 5520=2	4 o'coats,	6.50	26 00
4622	2 "	6.50	13 00
Job,	1 do. vests,	6.50	12 00
Box. & drayage			90
		151 40	
			600 65
	Brought forward		600 65

October 26, 1882.

4701	3 suits,	7.50	22 50
"	1 coat,		4 00
		26 50	

November 18, '82.

4732*i* 4631	1 dz. pants,		20 50
4177 4178	1 " "		16 50
4714	½ " "	20.50	10 25
2455–52	1 " "		19 00
4265–99	1 " "		15 00
4613–14	2 " "	8.00	16 00
4464–65	1 " "		19 00
4711	½ " "	19.00	9 50

	4024 = 8 2847 = 4 }	1 dz. coats	21 00
6	4402 1	" "	18 00
	4278 = 3 4282 = 3 }	6 " 2.50	15 00
4971	6 E. S. pants, all	5.00	30 00
4589	6 suits,	4.50	27 00
9750	4 "	all 8.50	34 00
9764	2 "	8.50	17 00
4285	6 "	3.75	22 50
9290	6 "	3.50	21 00
4742	3 "	9.75	29 25
4745	3 "	9.75	29 25
2528	3 "	7.50	22 50
4791	3 "	10.00	30 00
Box. & drayage			1 25
		443 50	

4837	6 suits,	10.00	60 00
4914	6 "	7.00	42 00
4881	6 "	8.50	51 00
4833	6 "	6.50	39 00
4884	6 "	7.50	45 00
4885	6 "	9.00	54 00
4891	6 coats,	2.37½	14 25
4282	6 "	2.37½	14 25
2887	12 "	1.62½	19 50
2828	6 suits,	5.00	30 00
2924	6 "	5.50	33 00
4906	6 vests,	1.12½	6 75
4869	6 suits,	5.50	33 00
4870	6 "	4.50	27 00
2727	6 "	3.25	19 50

7 *Mr. W. N. Jones Continued.*

Bought of Baer, Seasongood & Co., manufacturers and jobbers of clothing, 616 Locust street.

	Brought forward	1,070 65	
4580	6 c. & pants, 1.37½		8 25
4581	6 coats, 65		3 90
1060	6 suits, 9.50		57 00
4799	1 "		18 00
	Box. & dr-yage		1 25
		576 65	
	Credit	1,647 30	
	Allowance on bill 10–17	90	
		1,646 40	
	Interest to May 6, 1889	967 79	
		2,614 19	

STATE OF MISSOURI, } ss:
City of St. Louis, }

Simon Seasongood, a member of plaintiff- in the above-entitled cause, deposes and says that the annexed and foregoing account against W. N. Jones is just and correct, and that no part of the same has been paid except as credited thereon, and that there is still due and unpaid the sum of $2,614.19.

(Signed) SIMON SEASONGOOD.

Sworn to and subscribed before me this 6th day of May, A. D. 1889.

[L. S.] C. C. LOGAN,
Notary Public.

My com. expires June 28, 1889.

8 And thereupon, on said 20th day of May, A. D. 1889, said plaintiffs, Adolph Baer, Simon Seasongood, and Lewis Bierman, partners as aforesaid, filed their certain bond for costs in said cause; which said bond for costs is in the words and figures following, to wit:

In the United States Court for the Indian Territory.

BAER, SEASONGOOD & Co. }
vs. } Bond for Costs.
W. N. JONES. }

We undertake that the plaintiffs, Adolph Baer, Simon Seasongood, and Lewis Bierman, shall pay to the defendant, W. N. Jones, and to the officers of the court all costs that may accrue to them in this action, either in the United States court for the Indian Territory or any other court to which it may be carried.

(Signed) F. B. SEVERS.

Approved May 20th, 1889.
WM. NELSON, *Clerk,*
By W. R. SHACKELFORD, *D. C.*

And thereupon said plaintiffs, Baer, Seasongood & Co., on said 20th day of May, A. D. 1889, sued out of the clerk's office of said United States court for the Indian Territory their certain writ of summons against said defendant, W. N. Jones; which said writ of summons was in the words and figures following, to wit:

9 UNITED STATES OF AMERICA, }
Indian Territory. }

The President of the United States of America to the marshal of the Indian Territory:

You are commanded to summon W. N. Jones to answer, on the first day of the next called June session of the United States court for the Indian Territory, being the 3rd day of June, A. D. 1889, a complaint

filed against him in said court by Baer, Seasongood & Co., and warn him that upon his failure to answer the complaint will be taken for confessed, and you will make due return of the summons on the first day of the next called June session, 1889, of said court.

Witness my hand and the seal of said court, at Muscogee, Indian Territory, this 20th day of May, 1889.

[L. S.] WM. NELSON, *Clerk*,
By W. R. SHACKELFORD, *Deputy*.

10 Which said summons was afterwards, to wit, on the 3rd day of June, A. D. 1889, duly returned, with the following return indorsed thereon:

UNITED STATES OF AMERICA, *Indian Territory*, } ss:

Received the within summons this 23rd day of May, 1889. Served the same this 23rd day of May, 1889, by reading and delivering a true copy of the same to within W. N. Jones at the R. R. depot at Caddo, I. T.

T. B. NEEDLES, *Marshal*.
C. S. COOPER,
Deputy Marshal.

And thereupon, afterwards, to wit, at the said June special session of said court, A. D. 1889, on the 5th day of June, A. D. 1889, the same being the third judicial day of said session of said court, the following proceedings were had in said cause, to wit:

BAER, SEASONGOOD & Co.
vs.
W. N. JONES.

On this day comes the defendant, by his attorneys, and files his motion to quash the summons and return herein.

Which said motion is in the words and figures following, to wit:

11 In the United States Court for the Indian Territory.

BAER, SEASONGOOD & Co.
vs.
WILSON N. JONES. } Motion to Quash Summons.

Comes the said defendant and moves the court to quash the summons in this cause, because the same is made returnable at a time not known to the laws of the United States, to wit, the special June term, 1889.

CLAYTON, B., F. & OWEN,
Attorneys for Defendant.

12 And thereupon, afterwards, to wit, at the said June special session of said court, A. D. 1889, on the 18th day of June, A. D. 1889, the same being the 14th judicial day of said session of said court, the following proceeding were had in said cause, to wit:

BAER, SEASONGOOD & Co.
vs.
W. N. JONES.

On this day comes the defendant, by his attorney, and files his answer herein:

Which said answer is in the words and figures following, to wit:

"*Answer.*

In the United States Court for the Indian Territory.

BAER, SEASONGOOD & Co., Plaintiff-,
vs.
W. N. JONES, Defendant.

The defendant, W. N. Jones, for answer to the complaint of plaintiffs, Baer, Seasongood & Co., denies that he is indebted to the plaintiffs in the sum of $2,614.19 or any other sum whatever.

For a further defense the defendant says the cause of action mentioned in the complaint arose, accrued, and existed in the Indian Territory before the first day of March, 1889, and before the establishment and creation of this court.

For a third defense the defendant says that the cause of action did not accrue within 2 years next before the commencement of this suit.

For a further defense defendant says that he is an Indian by blood, and was at the time of the alleged contract a resident
13 of the Choctaw Nation, Indian Territory, and has since that time continued to reside therein, and is now a resident of said Territory.

C., B., F. & O.

W. N. Jones says that the facts stated in the foregoing answer are true.

W. N. JONES.

Sworn to and subscribed before me this 19th day of June, 1889.

WM. NELSON, *Clerk*,
[SEAL.] By W. R. SHACKELFORD, *D. C.*"

And afterwards, to wit, at the said June special session, A. D. 1889, of said court, on the 18th day of June, A. D. 1889, the same being the 14th judicial day of said term of said court, the following, among other, proceedings were had:

BAER, SEASONGOOD & Co.
vs.
W. N. JONES.

On this day come the plaintiffs, by their attorneys, and file their demurrer to the defendant's answer herein:

Which said demurrer is in the words and figures following, to wit:

"In the United States Court for the Indian Territory.

14 BAER, SEASONGOOD & CO., Plaintiffs,
vs.
W. N. JONES, Defendant.

The plaintiffs demur to the first, second, third, and fourth paragraphs of defendant's answer, and for ground of demurrer say that neither of said paragraphs state, any defense to the plaintiffs' complaint.

DU VAL, CRAVENS, TEMPLE & JACKSON,
For Plaintiffs."

And afterwards, to wit, at the said June special session of said court, A. D. 1889, on the 20th judicial day of said special session, the same being the 26th day of June, A. D. 1889, the following proceedings were had in said cause, to wit:

ADOLPH BAER, SIMON SEASONGOOD, and LEWIS BIERMAN, Composing the firm of Baer, Seasongood & Co.,
vs.
WILSON N. JONES.

The parties appeared by their attorneys, and the plaintiffs filed a demurrer to defendant's answer, and, the questions of law arising thereon being heard by the court, it is adjudged by the court that the answer of defendant is insufficient; and the defendant failing and refusing to plead or answer further, and it further appearing to the court that this suit is founded on an account duly verified by the affidavits of the plaintiffs, and it further appearing
15 to the court that the sum of two thousand six hundred and fourteen dollars and nineteen cents is due and owing on said account—

It is considered and adjudged by the court that the plaintiffs have and recover of and from the defendant the sum of two thousand six hundred and fourteen dollars and nineteen cents, and all their costs in this behalf expended, and that this judgment bear interest at the rate of six per cent. per annum, and that plaintiffs have execution therefor.

And thereupon came the defendant and excepted to the ruling of the court upon the demurrer.

And thereupon, afterwards, to wit, on the 15th day of July, A. D. 1889, came the defendant, by his attorney, and filed the affidavits of M. M. Edmonston and J. B. Forrester, which affidavits are in the words and figures following, to wit:

In the United States Court for the Indian Territory.

BAER, SEASONGOOD & CO.
against
W. N. JONES.

I, M. M. Edmonston, do solemnly swear that I am in nowise in-

terested in the above-entitled action, but swear that the value of the matter in dispute, exclusive of costs, exceeds one thousand dollars.

(Signed) M. M. EDMONSTON.

Sworn to and subscribed before me this July 15th, 1889.

[L. S.] WM. NELSON, *Clerk*,
By W. R. SHACKELFORD, *Deputy*.

16 In the United States Court for the Indian Territory.

BAER, SEASONGOOD & Co., Plaintiff-,
vs.
W. N. JONES, Defendant.

I, J. B. Forrester, do solemnly swear that I am one of the att'ys for defendant in the above-entitled action, lately pending in the United States court for the Indian Territory; that applying to the clerk of said court for a writ of error to the Supreme Court of the United States that the value of the matter in dispute, exclusive of costs, exceeds one thousand dollars.

(Signed) J. B. FORRESTER.

Sworn to and subscribed before me this 15th day July, 1889.

WM. NELSON, *Clerk*,
By W. R. SHACKELFORD, *Deputy*.

17 That afterwards, to wit, on the 15th day of July, A. D. 1889, the said plaintiff in error filed in the clerk's office of said United States court for the Indian Territory his certain appeal bond herein, which is in the words and figures following, to wit:

18 Know all men by these presents that we, Robert L. Owen, —— ——, are held and firmly bound unto Baer, Seasongood and Company in the full and just sum of thirty-five hundred dollars, to be paid to the said Baer, Seasongood & Co., certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 15th day of July, 1889.

Whereas lately, at a session of the United States court for the Indian Territory, in a suit depending in said court between Baer, Seasongood and Co. and W. N. Jones, a final judgment was rendered against the said W. N. Jones, and the said W. N. Jones having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the said judgment in the aforesaid suit, and a citation directed to the said Duval, Cravens, Temple and Jackson, att'y- of the said Baer, Seasongood and Co., and also on said Baer, Seasongood & Co., citing and admonishing them to appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next:

Now, the condition of the above obligation is such that if the said W. N. Jones shall prosecute said writ of error to effect and answer all damages and costs if W. N. Jones fail to make his plea good

then the above obligation to be void; else to remain in full force and virtue.

ROBERT OWEN. [SEAL.]
C. W. TURNER. [SEAL.]

Sealed and delivered in presence of—
——, ——.

Approved by—
JAMES M. SHACKELFORD,
Judge U. S. Court for the Indian Territory.

19 The United States of America to Adolph Baer, Simon Seasongood, and Lewis Bierman, partners in trade doing business under the firm name and style of Baer, Seasongood & Co., Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the United States court for the Indian Territory, wherein Wilson N. Jones is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable James M. Shackelford, judge of the United States court for the Indian Territory, this 29th day of July, in the year of our Lord one thousand eight hundred and eighty-nine.

JAMES M. SHACKELFORD,
Judge U. S. Court for the Indian Territory.

20 On this — day of ——, in the year of our Lord one thousand eight hundred and eighty —, personally appeared —— —— before me, the subscriber, —— ——, and makes oath that he delivered a true copy of the within citation to Col. Temple, a member of the law firm of Duval, Cravens, Temple & Jackson, attorneys for the defendants in error, at their office, in the town of Muscogee, I. T., on September 6th, 1889, at 3 o'clock p. m.

Sworn to and subscribed the — ——, A. D. 188–.

THOS. B. NEEDLES,
U. S. Marshal, Muscogee Dist., I. T.,
By T. M. WRIGHT, *Dept.*

Sep. 6, '89, 3 p. m., p'd $2.

21 That afterwards, to wit, at the regular September term, A. D. 1889, of said United States court for the Indian Territory, begun and holden at the town of Muscogee, in said Indian Territory, on the 2nd day of September, A. D. 1889—present, Honorable James M. Shackelford, judge of said court, presiding; Wm. Nelson, Esqr., clerk of said court; Thomas B. Needles, marshal of said court, and Zachary T. Walwood, Esqr., United States attorney for said court—the following further proceedings were had in said cause on

the first day of said term of said court, the same being the 2nd day of September, A. D. 1889, to wit:

BAER, SEASONGOOD & Co.
vs.
W. N. JONES.

On this day comes the defendant, by his attorney, and files his motion to set aside the judgment heretofore entered herein.

Which motion is in the words and figures following, to wit:

In the United States Court for the Indian Territory.

BAER, SEASONGOOD & Co., Plaintiff-,
vs.
W. N. JONES, Defendant.
} Motion to Set Aside Judgment.

James B. Forrester, being duly sworn, deposes and says that he is one of the attorneys of W. N. Jones in some nine cases pending in said court and of which the above and foregoing is one; that he, after having filed answer in all of said cases pending against
22 said Jones and after the jury had been discharged, *he* obtained leave of the court to return to his home, in the city of Fort Smith, with the understanding on the part of said affiant that all the business in which he was employed was continued until the regular September term of this court; that in the filing of answers to said causes of action it was intended to set up an answer to the merits of the case; that upon leaving Muscogee for his home, in Fort Smith, understanding that all of his business was continued until the next term of court, he left no one in charge of his business at said court; that upon the sustaining of demurrers to the above-entitled case, as well as a number of others, a friend living at Muscogee notified the affiant by wire of the action of said court, and that the court adjourned before motion to set aside said judgment could be made; that there was no opportunity to amend the answers so as to conform to the ruling of the court in sustaining the demurrers to the answers; that in his opinion, from consultation with the witnesses and of the defendant himself, the defendant has a meritorious defense, and that the sustaining of demurrer, especially to the answer denying the debt, was a great surprise to the defendant.

Wherefore he prays *to* court to set aside said judgment and that the case may be reinstated upon the record.

(Signed) J. B. FORRESTER.

Sworn to and subscribed before me this 6th day of August, 1889, at city of Fort Smith, Arks.

[L. S.] JAMES BIZZOLARI,
Notary Public.

23 And afterwards, to wit, on the 6th day of September, A. D. 1889, the same being 5th judicial day of said regular September term, 1889, of said court, the following further proceedings were had in said cause:

BAER, SEASONGOOD & CO.
vs.
W. N. JONES. } 138.

On this — come the parties, and the motion heretofore filed coming on to be heard, and the court, being sufficiently advised in the premises, doth overrule the same.

UNITED STATES OF AMERICA,
Indian Territory, } *ss:*

I, William Nelson, clerk of the United States court for the Indian Territory, do hereby certify that the above and foregoing is a full, true, and complete transcript of *of* the record in the cause late in said court, wherein Adolph Baer, Simon Seasongood, and Louis Bierman, partners trading and doing business under the firm name and style of Baer, Seasongood & Co., are plaintiffs and Wilson N. Jones is defendant, as the same appears from the records and files in my office.

Seal United States Court for the Indian Territory.

Witness my hand and the seal of said court hereon impressed, at Muscogee, in the Indian Territory, this 8th day of October, in the year of our Lord one thousand eight hundred and eighty-nine, and of the Independence of the United States the 114th.

WM. NELSON,
Clerk United States Court for the Indian Territory.

24 Supreme Court of the United States, of October Term, 1889.

W. N. JONES
vs.
BAER, SEASONGOOD & CO. } In Error.

Afterwards, to wit, on ——, in the same term, before the justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, comes the said W. N. Jones, by his attorneys, Clayton, Brizzolara, Forrester & Owen, and says that in the record and proceedings aforesaid there is manifest error, in this, to wit: That the said W. N. Jones had by law until the third day of the September term, 1889, to answer the complaint filed against — by the said Baer, Seasongood & Co., and that no judgment could be lawfully entered against him in said cause at said special June term nor at any time prior to said third day of said September term, 1889; and also in this, to wit: That the writ of summons which commanded him to appear and answer said complaint was insufficient and unauthoritative, in that it did not command said

25 W. N. Jones to answer the complaint filed against — at the said September term, 1889, but instead on the first day of the called June session of said U. S. court for the Indian Territory, and in that it was duly attested, and should have been quashed and set aside.

And there was also error, in this, to wit: That said court did not

have jurisdiction of the persons parties to said cause nor of the subject-matter thereof.

And there was also error, in this, to wit: That each and every one of the four paragraphs contained in the answer of the said W. N. Jones to the complaint filed against him set up a good and sufficient defense in bar of said action, and should have been so held by the court.

And there is error also, in this, to wit: That the complaint aforesaid and the matters therein contained do not show that the court had jurisdiction of the persons of the parties or the subject-matter of the suit, and they are not sufficient for the said Baer, Seasongood & Co. to have or maintain their aforesaid action thereof
26 against the said W. N. Jones.

And there is also error, *is* in this, to wit: That the amount of the said judgment against the said W. N. Jones is excessive and unlawful.

And there is also error, in this, to wit: That by the record aforesaid it appears that the judgment aforesaid given was given for the said Baer, Seasongood & Co. against the said W. N. Jones, whereas by the law of the land it should have been given for the said W. N. Jones against the said Baer, Seasongood & Co., and the said W. N. Jones prays that the said judgment aforesaid may be reversed, annulled, and altogether held for nothing, and that he may be restored to all things which he lost by reason of said judgment, &c.

CLAYTON, BRIZZOLARA, FORRESTER & OWEN,
Att'ys for Plaintiff in Error.

[Endorsed:] Filed Aug. 28, 1889. Wm. Nelson, clerk.

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FILED.
MAR 25 1893
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CLERK.

Supreme Court of the United States.

OCTOBER TERM, 1892.

WILSON N. JONES, Plaintiff in Error,

vs.

ADOLPH BAER, SIMON SEASONGOOD, AND LEWIS BIERMAN, Partners under the Firm Name and Style of Baer, Seasongood & Co.

No. 220.

In Error to the United States Court for the Indian Territory.

BRIEF FOR PLAINTIFF IN ERROR.

In 1882 Wilson N. Jones, plaintiff in error, was carrying on a mercantile business at Caddo, Choctaw Nation, I. T., and purchased, as alleged in the complaint, along in the year 1882, of Baer, Seasongood & Co., defendants in error, at St. Louis, Mo., the goods and merchandise for which this suit was brought, amounting to the sum of $2,614.19; Wilson N. Jones being a Choctaw Indian, and residing at that time and ever since at Caddo, Choctaw Nation.

An action at law on this open account was brought by Baer, Seasongood & Co., against Jones on the 20th day of May, 1889, in the United States Court for the Indian Territory, at Muscogee, I. T., claiming 10 per cent. interest on the open account. (Rec. 2, *et seq.*)

To this action Jones set up by his answer, filed on the 18th day of June, 1889, in four paragraphs, four several defenses, as follows (Rec., 7):

1st. Denying any and all indebtedness.

2d. That the cause of action accrued in the Indian Territory before the 1st day of March, 1889, and before the establishment of the United States Court in the Indian Territory.

3d. The statute of limitation of three years.

4th. That Wilson N. Jones is an Indian by blood, and was at the time of the alleged contract a resident of the Choctaw Nation, Indian Territory, and has since that time continued to reside therein and is now a resident of said Indian Territory.

On the 18th day of June, 1889, Baer, Seasongood & Co. demurred to each paragraph of the answer, because the same did not state any defense to plaintiff's complaint (Rec., 7 and 8).

On the 26th day of June, 1889, the demurrer was sustained and the answer held insufficient, and judgment was rendered against plaintiff in error (Rec., 8).

Afterwards, on the 2d day of September, 1889, motion to set aside the judgment was filed by plaintiff in error, and on the 6th day of September, 1889, overruled, whereupon the necessary legal steps were had and the cause brought to this court (Rec., 11 and 13).

The errors assigned (Rec., pp. 12 and 13) are these:

That the said W. N. Jones had, by law, until the third day of the September term, 1889, to answer the complaint filed against him by the said Baer, Seasongood & Co., and that no judgment could be lawfully entered against him in the cause at such special June term, nor at any time prior to said third day of said September term, 1889, and also in this, to wit:

That the writ of summons which commanded him to appear and answer the complaint was insufficient in that it did not command said W. N. Jones to answer the complaint filed against him at the said September term, 1889, but instead, on the first day of the called June session of said United States Court for the Indian Territory, and in that it was not duly attested, and should have been quashed and set aside.

And there was also error in this, to wit, that said court did not have jurisdiction of the persons parties to said cause nor of the subject-matter thereof.

And there was also error in this, to wit, that each and every one of the four paragraphs contained in the answer of the said W. N. Jones to the complaint filed against him set up a good and sufficient defense in bar of said action, and should have been so held by the court.

And there was also error in this, to wit, that the complaint aforesaid, and the matters therein contained, do not show that the court had jurisdiction of the persons of the parties or the subject-matter of the suit, and they are not sufficient for the said Baer, Seasongood & Co. to have or maintain their aforesaid action thereof against the said W. N. Jones.

And there is also error in this, to wit, that the amount of the said judgment against the said W. N. Jones is excessive and unlawful.

And there is also error in this, to wit, that by the Record aforesaid, it appears that the judgment aforesaid given was given for the said Baer, Seasongood & Co. against the said W. N. Jones, whereas by the law of the land it should have been given for the said W. N. Jones against the said Baer, Seasongood & Co., and the said W. N. Jones prays that the said judgment aforesaid may be reversed, annulled, and altogether held for nothing, and that he may be restored to all things which he lost by reason of said judgment, &c.

The questions fairly arising and involved in the case are:

1st. As to whether or not the act of Congress creating a United States Court for the Indian Territory, approved March 1, 1889 (25 U. S. Statutes at Large, page 783), is retroactive?

2d. Should the court have overruled the demurrer to the answer?

3d. As to whether or not, if the act of Congress is retroactive, the action on the open account was not barred by the Statute of Limitation of three years?

We contend:

1st. That the act of Congress creating the U. S. Court for the Indian Territory is not retroactive, and created, and gave no right of action where none existed prior to the passage of the act.

2d. That as to the demurrer, it running through the Record, the judgment should have gone against the defendants in error, or if sustained at all should have been sustained as to the 2d and 4th paragraphs of the answer only and overruled as to the 1st and 3d, because the first paragraph specifically denied any and all indebtedness, and the 3d presented a defense upon the fact of limitation and as a necessary result: —

The act of Congress, having adopted the practice, pleadings, and forms of procedure existing at the time of the passage of the act in like civil causes in courts of record of the State of Arkansas, that this provision carried with it the Statute of Limitations existing in the State of Arkansas in 1889, which as to open accounts is three years.

The provisions of this act of Congress of 1889, in regard to the civil jurisdiction of the United States Court

for the Indian Territory are contained in section 6 (25 U. S. Statutes at Large, page 784), and are as follows:

"That the court hereby established shall have jurisdiction in all civil cases between citizens of the United States who are residents of the Indian Territory, or between citizens of the United States, or of any State or Territory therein, and when the value of the thing in controversy, or damages or money claimed shall amount to one hundred dollars or more."

* * * * * * *

"That the provisions of Chapter 18, Title 13, of the Revised Statutes of the United States shall govern such court so far as applicable; provided that the practice, pleadings and forms of proceeding in civil causes shall conform as near as may be to the practice, pleadings and forms of proceeding existing at the time in like causes in the courts of record of the State of Arkansas, any rule of court to the contrary notwithstanding; and the plaintiff shall be entitled to like remedies by attachment or other process against the property of the defendant, and for like causes as now provided by the laws of said State."

* * * * * * *

Prior to the passage of this act of Congress of March 1, 1889, no right of action of any kind or nature was given in the Indian country in any court unless parties were citizens of different States, and the amount in controversy exceeded, exclusive of costs, the sum or value of five hundred dollars, which was afterwards increased to a sum exceeding two thousand dollars, exclusive of interest and costs. (See Judiciary act, 1789, 1st Stat. at Large, 79, and amendatory acts made from time to time by Congress; act of March 3, 1875, and act of March 3, 1887, 24 Stat. at Large, 552.)

In this respect it is necessary to trace the legislation of Congress as to the civil jurisdiction of the Federal courts in the Indian Territory, or rather the Indian country.

Congress defines what is Indian country:

Section 1, act of Congress approved June 30, 1834. (4th U. S. Statutes at Large, page 729.)

Section 24 of said act annexes the said Indian country to judicial districts, and that part in which Jones lives, Choctaw Nation, was thereby added to the Territory of Arkansas for judicial purposes.

Section 25 of said act extends the laws of the United States, as to crimes, over the said Indian country. (4th U. S. Stat. at Large, p. 733.)

Section 4 of act of Congress of June 15, 1836 (5th U. S. Stat. at Large, p. 51), admitting the Territory of Arkansas as a State, created one judicial district. By this act there was no provision attaching any of the Indian country to the judicial district of Arkansas.

This provision was attempted to be remedied by act of Congress of March 1, 1837. (5th U. S. Stat. at Large, p. 157.)

Then the act of June 17, 1844, was passed. (5th U. S. Stat. at Large, p. 680.)

No change in the jurisdiction of the court was made until the act of March 3, 1851 (9th U. S. Stat. at Large, p. 594), when jurisdiction of all civil cases was conferred upon the United States Court for the Western District of Arkansas.

This civil jurisdiction being governed by the laws of the United States in regard to jurisdiction conferred upon United States courts by act of Congress, is as hereinbefore stated.

Hence, prior to the time of the passage of the act of Congress of March 1, 1889, creating the United States Court for the Indian Territory, no right of action was given or conferred on the defendants in error, because defendants in error being citizens of the State of Missouri, and Jones a Choctaw Indian and a resident of the Choctaw Nation, no action could have been brought against

plaintiff in error, unless the plaintiff in error should have gone and been found in Missouri or Arkansas, or some other State or Territory, and service there obtained upon him. This was the status of matters at the time, and immediately prior to the act of Congress creating the Muscogee court. (Karrahoo *v.* Adams, 1 Dill., 344, and cases cited and notes; 17 Wall, 242; 112 U. S., 94.)

We insist that the act by its very terms is not retroactive and does not bring into existence a cause of action wherein none existed prior to the passage of the act.

The act of Congress of March 1, 1889, does not in express terms give jurisdiction to the United States Court for the Indian Territory over causes of action that did not exist prior to the passage of such act. As the act can not be retroactive, the court had no jurisdiction of the subject-matter of the controversy.

In other words, where a remedy is given, an act may be retroactive, but not when a right of action is given.

A prospective, not a retrospective, construction of a statute is to be preferred, and no statute will be construed so as to give it a retroactive effect unless such is the unequivocal expression or unavoidable implication of its words. (Endl. Interp. Stat., Secs. 271, 272, 277; Sedg. Const'n, pp. 161–164; Shrevesport *v.* Cole, 129 U. S., 36.)

Now as to the demurrer: It is a well-known and familiar rule of law, that a demurrer goes back through the record to the first pleading, and conceding for argument's sake that the act of Congress was retroactive, and that the U. S. Court had jurisdiction, yet the complaint in this action is fatally defective, as it shows upon its face that the court had no jurisdiction, because the allegations which should be set forth in the complaint to give the court jurisdiction were wholly omitted.

The complaint in this case should have alleged that the defendants in error were citizens of the United States, or citizens of some State or Territory, and residing therein, and that plaintiff in error was a resident of or to be found in the Indian Territory.

Sec. 6, act of Congress, March 1, 1889, 25 U. S. Statutes at Large, p. 784.

The allegation in this respect contained in the complaint, that defendants in error are "residents of St. Louis, Mo.," and "W. N. Jones, of the Choctaw Nation, I. T.," is not sufficient, because to give the court jurisdiction under Sec. 6 of the act, the controversy must be between citizens of the United States who are residents of the Indian Territory, or between citizens of the United States, or of any State or Territory therein, and any citizen of, or person or persons residing or found in the Indian Territory. A person may be of the Choctaw Nation but may not reside or be found therein. These allegations are necessary to give the court jurisdiction.

The United States Court for the Indian Territory having jurisdiction only between certain classes of persons, and where the amount in controversy is, or rather exceeds, $100.00, both these facts must affirmatively appear upon the face of the complaint.

The complaint in this case shows the jurisdictional amount, but contains no allegation showing that the controversy is between the class of persons over which the court has jurisdiction.

United States *v.* Pratt Coal and Coke Co., 18 Fed. Rep., 708;
West *v.* Wood, 18 Fed. Rep., 665.

It is the duty of the plaintiff when bringing suit to make the jurisdiction appear, and appear affirmatively and beyond all doubt, and not by mere implication.

Menard *v.* Goggan, 121 U. S., 253;
Chapman *v.* Barney, 129 U. S., 677;
Denny *v.* Pironi, 141 U. S., 121.

The United States Court for the Indian Territory being a court of limited jurisdiction, it is necessary to set forth the facts or circumstances which give jurisdiction, either expressly or in such manner as to render them certain by legal intendment.

Bump's Fed. Proc., 143 to 146, inclusive;
Spear's Fed. Jud., 145 to 147, inclusive, and cases *sup.*

And if this is not done, the whole proceeding is erroneous.

U. S. *v.* Clark, 8 Pet., 436;
Bushnell *v.* Kennedy, 9 Wall., 387;
Ex parte Smith, 94 U. S., 455.

And as a demurrer, as before stated, runs through the Record, judgment should have gone against the defendants in error, as it it held that a demurrer to an answer reaches a complaint that shows a want of jurisdiction.

Gould's Pl'd'g, Chap. 9, pages 36–40;
18 Amr. Enc. Law, 514, and Note 6;
Sec. 417, A. Bliss Code Pleadings, and Note 3;
Wood *v.* Terry, 30 Ark., 385;
Pettus *v.* Harris, 11 *Ib.*, 294;
Boone on Code Pleading, Sec. 112 and Notes;
Newman Pleading and Prac., pages 651 and 686.
Gorman *v.* Lenox, 15 Pet., 115; U. S. *v.* Linn, 1 How., 104.

The demurrer should not have been sustained as to the first paragraph of answer, because this paragraph sets up that the plaintiff in error was not indebted to the defendants in error in the sum of $2,614.19, or any other sum whatever. This surely was a valid defense to the cause of action.

If the complaint contains two or more counts and it contains one good count, the demurrer must be overruled.

Maxwell on Code Pleading, 375;
Turner *v.* Tapscott, Adm'r, 30 Ark., 312.
U. S. *v.* Girault, 11 How., 92; County *v.* McKenzie, 94 U. S., 660.

On demurrer, as before intimated, the court will consider the sufficiency of previous pleadings.

Freeland *v.* McCullough, 1 Denio, 414;
Yell *v.* Snow, 24 Ark., 554;
1 Nash's Pl. and Pr., 148 and 152.

And if the answer contains any defense the demurrer will be overruled.

Boone on Code Pleading, Sec., 113, Note 3; and cases *sup.*

Hence, in any view of the case, the demurrer should have been overruled, and the court erred in not so doing.

As by Sec. 6 of the act of Congress of March 1, 1889, the practice, pleadings, and mode of procedure of the State of Arkansas is adopted, we contend that this carries with it the Statute of Limitations, and that thereby the action is barred, as the same should have been commenced within three years after the cause of action accrued.

Sec. 4478 Mansfield's (Ark.) Digest.

It would be a ridiculous waste of time to cite cases showing that section 6 of the act of March 1, 1889, gave the defenses to Jones in this suit he would have had in an Arkansas court if sued there; and this being true, he had the right to his defense of limitation of three years as pleaded, which he was deprived of by the court.

For these several errors it is apparent this case should be reversed.

A. H. GARLAND and
H. J. MAY,
For Plaintiff in Error.

Office Supreme Court U. S.
FILED.
APR 8 1893
JAMES H. McKENNEY,
CLERK.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1892.

WILSON N. JONES, - Plaintiff in Error,
vs.
ADOLPH BAER ET AL., - Defendants in Error.
} No. 220

BRIEF FOR DEFENDANTS IN ERROR.

L. P. SANDELS,
JOS. M. HILL,
W. T. HUTCHINGS,
For Defendants in Error.

... & CO., PRINTERS, FORT SMITH, ARK.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1892.

WILSON N. JONES, - Plaintiff in Error,
vs. } No. 220
ADOLPH BAER ET AL, - Defendants in Error.

BRIEF FOR DEFENDANTS IN ERROR.

ABSTRACT.

On April 5, 1889, James M. Shackelford, Judge of the United States Court for the Indian Territory, made a call for special session of the Court to be begun on June 3, 1889, and the call was duly published. All writs were made returnable

at this called term. On May 20, 1889, Adolph Baer and others filed their complaint against Wilson N. Jones and asked for judgment upon open account for $1646.40 and interest thereon amounting to $967.79. The writ was issued returnable June 3, 1889, and was duly served. On the 5th day of June, 1889, defendant filed his motion to quash the summons because returnable at the called session.

Afterwards, on the 18th day of June, 1889, defendant filed his answer (1) denying generally his indebtedness in the sum of $2614.19 or any other sum; (2) alleging that the cause of action arose in the Indian Territory and before the creation of the Court; (3) alleges the cause of action did not accrue within three years; (4) alleges he is an Indian by blood and at the time the contract was made was a resident of the Choctaw Nation, and still is.

On June 18 plaintiffs demurred to each of the several defenses and the demurrer was sustained June 26, and defendant declining to plead further judgment was rendered by default for $2614 19.

The errors assigned are: "A." The Court had no authority to call a special term or session and the judgment against him at such term is void. "B." The sustaining of the demurrer to the answer. "C." That the amount of judgment was excessive. "D." That the claim was barred by limitation. "E" That the cause of action accrued in the Indian Territory prior to the passage of act March 1, 1889, and the defendant was an Indian by blood and, that the Court was without jurisdiction either as to the parties or subject matter.

BRIEF.

"A." The Court, by virtue of section 7, act March 1, 1889, had the power to call special sessions; "That two terms of said Court shall be held each year, at Muscogee, in said Territory, on the first Monday in April and September and such special session as may be necessary for the dispatch of business in said Court at such times as the Judge may deem expedient; and he may adjourn such special sessions to any other time previous to a regular term." The Revised Statutes use the words "term" and 'session" as synonomous and the grant in this section is as full and ample as in section 581 and section 661, *et seq.*

If the court had jurisdiction over the subject matter, then the appearance and answer of the defendant waived all objections

Eddy vs Lafayette, 49 F., 807.

Railway Co. vs. McBride, 141 *U. S.* 127.

"B."

The answer of defendant was a mere plea of *nil debet,* and was, under our code, a nullity.

Lawrence vs Myer, 35 Ark., 104.

"C."

The excessiveness of amount of verdict when suit was upon contract is no ground of error. If the amount sued for was more than was justly due it was a matter of defense.

"D."

At common law there was no limitations to civil actions. In case of torts the wrong died with the injured party.

The common law courts established the doctrine of presumption which corresponded to the equitable doctrine of stale claims. The limitation of actions, whether civil or criminal, is entirely a matter of statute.

Wood on Limitations, Sec. 2.

The act March 1, 1889, created no limitations. Only the system of pleading and practice in force in Arkansas was adopted. There being no statute of limitations within the Indian Territory (the law of the forum) it was immaterial whether the contract was made in Missouri or the Indian Territory.

Wood on Limitations, Sec. 8; notes 3 and 4, p. 17, and note 1, p. 18.

Railway vs O'Laughlin, 49 F., 440.

"E."

This assignment can be sub-divided into two questions: I. The liability of the Indian upon contract obligations. II. The validity of the act of Congress approved March 1, 1889, establishing a Court within the Indian Territory, so far as it affected contracts entered into prior thereto.

I.

The act of Congress approved March 3, 1847, declaring executory contracts with Indians void has been repealed, except as set forth by sections 2086 and 2087 by section 5596, R. S.

The only statutory limitation since 1873 on the right of the Indian to contract is set forth in section 2103, *et seq*, which relates to Indian lands, annuities, etc. Section 2126 R. S.

recognizes the validity of contract between Indians and white men, by declaring that the burden of proof shall be upon the white man, when he seeks to enforce the contract.

A contract is an agreement between two persons capable of contracting to do or not to do a thing for a consideration. There is no such thing as a natural incapacity to contract. Without the restriction of law all persons are capable of contracting. The law has rendered incapable of contracting idiots, insane persons, non-compotes, minors, and to different degrees, married women.

The Indian falls under none of these heads. By act March 3, 1847, he was declared incapable of contracting under certain circumstances. By the repeal of that law the drapery of infancy was taken from his loins and he became a man "capable of contracting." Even if this act had not been repealed the contract was enforceable wherever the Indian could be found within the jurisdiction of a Court with power to enforce contracts.

These goods were purchased in St. Louis, in the state of Missouri. The contract of sale was made in St. Louis, and being a Missouri contract, did not fall within the inhibition of the act of March 3, 1847.

Hicks vs Ewhartonah, 21 Ark., 106.

Taylor vs Drew, 21 Ark., 485.

II.

Section 6, act Congress, approved March 1, 1889, reads: The Court hereby established shall have jurisdiction in all civil cases between citizens of the United States who are residents

of the Indian Territory or between citizens of the United States or of any state or territory, and any citizen of or person residing within or found in the Indian Territory, and when the value of the thing in controversy or damages in money claimed shall amount to one hundred dollars or more. Provided that nothing herein contained shall be so construed as to give the Court jurisdiction over controversies between persons of Indian blood only, etc.

Appellants contend that jurisdiction can only be given over causes of action arising after the passage of the act. That if this act intended to give jurisdiction to enforce contracts entered into prior to March, 1889, it is void as being retroactive, etc.

This involves a discussion of three things :

X. The causes which lead to the passage of the act.

Y. The power of Congress to enact.

Z. The settled rule of construction of statutes affecting rights and remedies.

It is an ancient maxim—older than the child-like habit which plaintiff in error has of avoiding his contracts—that we best know a law when we know the causes which lead to its enactment. This is more especially true when there is the slightest doubt as to its scope and object.

From the time when Congress set apart this vast domain for the habitation of the Indian tribes there has been no Court having civil jurisdiction therein except the tribal Courts. These Courts necessarily had jurisdiction only of the persons

of Indians by blood or adoption. Yet the absence of a place to enforce contracts did not prevent the making of contracts. Wherever men exist there will be bargain and sale, labor and hire. The existence of a contract does not depend upon a power to enforce it. A contract is in the nature of things; the power to enforce it by judicial methods is an outgrowth of civilization. The existence of the common or civil law in no wise affects the existence of a contract, but merely the mode and manner of enforcing it. A Hottentot in his native clime—where the semblance of a law never startled the conscience of criminals or shielded the pathway of the honest man—can buy and sell, can bind himself as firmly to do or not to do a par-particular act as though he were Archbishop of Canterbury or Keeper of the King's Conscience. And that same Hottentot enjoys no vested interest in the absence of a Forum wherein that contract can be enforced.

There being no Forum in which to enforce contract obligations within the Territory, men were relegated to their natural rights in the premises. If your neighbor would not pay his debts you might hamstring his horses or burn his barn, and by these means bring him to rectitude of contract. Matters continued thus for many years to the inconvenience of live stock and the detriment of barn building, with no one seriously protesting except the merchants of St Louis, who through Senator Vest, yearly called the attention of Congress to this asylum of solvent debtors—this modern Alsatia. Finally the great cattle craze of 1883 came. All over the Territory men sold their

stocks of goods—told their creditors like their cattle "to go to grass"—and invested the proceeds in cattle. The local banks in Texas, Kansas, Missouri and Arkansas were drained to supply the demands of these would-be cattle barons. Farmers who had saved a little cash from a life of unpoetic toil, merchants and small capitalists rushed to beg some man who had a "right" in this prairie paradise to take their little all and invest in cattle. Then in 1884 came the crash. Millionaire cattle kings flitted from their palatial residences in Texas and fled back to the silence and solitude of the ranges. Some became cowboys for their creditors; some reverted to their ancient calling and fell into "Indian file" with the patient mule and tickled the bosom of mother earth.

A million dollars of indebtedness hung over the Territory and there was no Forum in which these debtors could be called to account. Honest men gave up their all—dishonest men enjoyed the immunity afforded by this condition of things and continued to shine with undimmed brilliancy. Misery loves company and so the creditors of Texas, Arkansas, Missouri and Kansas joined the merchants of St. Louis and held great conventions, one in Baxter Springs, Kansas, the other at Fort Smith, Arkansas. These conventions were composed of intelligent and able men—lawyers, bankers, merchants, and farmers, and this is the result of their conference:

"It is evident that crime is on the increase in proportion to the influx of whites into the Indian Territory. The policy of the United States Government has made this Territory a

civil as well as a criminal asylum. *No remedies for the enforcement of obligations or property rights between the whites exist;* and whites from the states seek refuge there from civil and criminal process. That a criminal from the states fleeing to the Territory cannot be reached by extradition or other methods

"2. That in justice to the Indians inhabiting the Indian Territory and in furtherance of a sound policy in providing civilization among them as well as in simple justice and fairness toward the people of the states bordering on said Territory, such action should be taken by the Congress of the United States as will give to the Indian of the whole Territory the protection of the laws of the United States for life, liberty and property the same as is accorded to the inhabitants of other territories of the United States; and at the same time give to the citizens of the states the same rights and afford them the same legal remedies accorded by law to them in the other territories of the United States. That to that end such Court or Courts as contemplated by the treaties of 1866 with usual jurisdiction of all Territorial United States Courts, should be established at once; and such Territorial Government be provided for the Territory as may be deemed necessary to effect the objects hereinbefore recited, and under the laws of Congress shall be *adequate to the protection of persons and the enforcement of contracted obligations,*" etc., etc.

These same resolutions go into details and ask that such Court have jurisdiction in all cases involving $100, including interest. Now we do not contend that the resolution of a con-

vention of gentlemen who suffered in the flesh and the purse governs the action of Congress or furnishes any new rule of construction for the Courts. But where immediately following this demand Congress enacts a law establishing a Court with the exact jurisdiction suggested by the resolution, it does not seem at all unreasonable to suppose that this Court was established and jurisdiction conferred to enforce "contracted obligations."

Congress proposed to remedy some evil. What was that evil? Was it the inability of men to collect debts contracted at some future time? These men demanded relief from something more urgent than apprehended defaults. They suffered and asked relief from a "condition and not a theory;" they asked a Forum in which to enforce "contracted obligations." This was the evil that Congress was asked to remedy.

"Y." What power had Congress to enact laws affecting contracted obligations?

Section 8 Constitution U. S.—Congress shall have power * * * (paragraph 17) to make all laws which shall be necessary and proper for carrying into execution the foregoing powers and all other powers vested by this Constitution in the Government of the United States or in any department or officer thereof.

Section 9 states those powers denied to Congress.

Section 10 states those powers denied to the states.

In the same section and sentence wherein the states are forbidden to pass any law impairing the obligation of a contract

it is forbidden them to enter into any treaty, grant letters of marque, etc., enumerating certain Federal powers. Congress is therefore not only not forbidden from enacting laws impairing the obligation of contracts; but from the Context of Section 10 paragraph 1 it would seem that this power has been specially conceded.

By act July 11, 1862, *12 Statute at Large, 532*, known as the Legal Tender Act, Congress provided that paper money should be receivable as lawful money for all debts, public or private. As the law then existed only silver and gold were legal tender. This law clearly impaired the obligation of a contract. Yet in *Knox vs Lee* and *Parks vs Davis, 12 Wall, 457* after a most able and exhaustive argument, this Court held: 1—That Congress had the power to enact laws impairing the obligation of contracts. 2—The act was intended to affect and did affect past as well as future contracts.

If then Congress has the power to enact laws impairing the obligation of a contract, what utter folly to contend that it has not the power to establish a Court with power to enforce subsisting obligations.

Fortunately this distinction has been considered by this Court: Congress enacted a law giving to the Supreme Court of the Territory of Arkansas jurisdiction over causes over which it previously had no jurisdiction. In *Sempeyrac vs U. S., 7 Peters, 237*, the Court, construing this act, says: "But considering the act of 1830 as providing a remedy only, it is entirely unexceptionable. It has been repeatedly decided in this

Court that the retrospective operation of such a law forms no objection to it. Almost every law providing a new remedy affects and operates upon causes of action existing at the time the law is passed. The law of 1830 is in no respect the exercise of judicial powers. It only organizes a tribunal with powers to exercise judicial proceedings."

All acts of Congress affecting the amount in controversy to gain jurisdiction in the Federal Courts; the question of removal of causes and all questions of remedies or rights of action are held uniformly as applying to actions instituted after the passage of the act, no matter whether the cause of action arose before or after the date of the enactment.

Larkins vs Saffrans, 15 Fed. R., 147.

Not only is the contention of counsel that Congress can not pass a retrospective law wholly without authority, but it has not even the analogy of such a rule in matters of state legislation. In *Satterlee vs Matthewson, 2 Peters, 380*, the Court says: "There is no part of the Constitution of the United States which forbids the legislature of a state from exercising judicial functions; nor is there any provisions thereof which applies to a state law which divests vested rights so long as such acts do not impair the obligation of a contract; nor are we aware of any decision of this Court or any Circuit Court which has condemned such a law on such a ground."

In other words, the rule in matters of state legislation is that unless forbidden by some clause of the state constitution the legislature of any state can pass any law retroactive in

effect, even to the extent of divesting vested rights unless the effect is to impair the obligation of a contract.

Fee vs Cowdray, 45 Ark., 410.
Watson vs Mercer, 8 Peters, 88.
Charles River Bridge vs Warren, 11 Peters, 420.
Drehman vs Stifle, 8 Wall, 595.

And when the act affects only the remedy there is nowhere any inhibition upon the Congress of the United States or the legislature of the states limiting the operation of such laws to future transactions.

Potter's Dwarris on Statutes, p. 231.
Sedgwick Statute and Cons. Law, p. 359.
Myers Fed. Dec., Vol. 7, Secs. 1645 and 1646.
Bronson vs Kinzie, 1 Howard, 312.

In New Hampshire the constitution contains this clause: "Retrospective laws are highly injurious, oppressive and unjust. No such laws therefore should be made either for the decision of civil causes or the punishment of offenses."

Yet in *Willard vs Harvey, 24 N. H., 354; Rich vs Flanders, 39 N. H., 304,* and *Clark vs Clark, 10 N. H., 380,* the Supreme Court holds that the legislature is not thereby prohibited from enacting remedial legislation affecting existing causes of action.

See also

Worsham vs Stevens, 66 Texas, 89.
Green vs Abraham, 43 Ark., 421.
Johnson vs Richardson, 44 Ark., 365.
Larkins vs Saffrans, 15 F. R., 147.

Wade on Retroactive Laws, 5, 6, 9-24, 198-242.
Cooley Cons. Lim., 114-117, 348-357, 443.
Nichols vs Gee, 30 Ark., 135.
Myers Fed. Dec., Vol. 11, p. 217.
Hycoming Co. vs Union Co., 15 Pa. St., 166.
New Orleans vs Clark, 95 U. S., 644.

A very similar state of facts has been passed upon in Texas. That vast body of land known as the Panhandle had been defined as the Panhandle Land District and had been attached to one of the adjoining counties for all purposes of criminal jurisdiction. No Court, however, had any civil jurisdiction whatever over this territory. There was no Forum whose civil writ ran in this territory for the enforcement of civil rights and contracted obligations. Finally the legislature of Texas annexed this territory to the District Court of Travis County for all purposes of civil jurisdiction. In *Ward vs Hubbard, 62 Texas, 694,* the Court held that the jurisdiction of the District Court of Travis County extended to causes of action arising before the passage of the act.

Whether the common law or the civil law existed in the Indian Territory is immaterial. On that question the Supreme Court of Arkansas, in *Wright vs Garner, 52 Ark., 285,* and the the Supreme Court of Kansas, in *Speer vs M., K. & T. Ry., 23 Kansas, 572,* seem to have arrived at different and equally logical conclusions.

This simple fact governs us: That Congress has control and jurisdiction of all Indians, Indian Reservations and Indian

Country, and under this authority had the power io establish a Court or Courts within the Indian Territory with powers adequate to the preservation of personal and property rights and the enforcement of contracted obligations.

U. S. vs Kagama, 118 U. S., 375.
Cherokee Treaty 1866, Art. 13.
Creek Treaty 1866, Art. 10.
Choctaw Treaty 1866, Art. 8, Sec. 8.

"Z." The rule of construction of remedial statutes is that unless the legislature specially restricts their operation to future causes of action such statutes are to receive a liberal construction and will be given a retroactive as well as prospective effect.

Sedwick Con. and Stat. Lim., p. 359.
Larkins vs Saffrans, 15 F. R., 147.
Fishers vs Dabbs, 6 Yerger, 118.
Judkins vs Toafe, 27 Pac., 221.

In the Legal Tender Act above referred to there are no words giving a retroactive effect to the act, yet the Court held in the cases cited that it extended to past as well as future contracts. " Almost every law providing a new remedy affects and operates upon causes of action existing at the time the law is passed."

Sempeyrac vs U. S., 7 Peters, 237.

"The bringing of a suit vests in a party no right to a particular decision His case must be determined on the law as it stands at the time of the judgment, not at the time of the

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Sempeyrac vs U. S., 7 Peters, 237.

"The bringing of a suit vests in a party no right to a particular decision His case must be determined on the law as it stands at the time of the judgment, not at the time of the

bringing of the suit. And if pending an appeal the law is changed, the Appellate Court must determine the case under law in force at the time of its decision.

Green vs Abrahams, 43 Ark., 420.

Johnson vs Richardson, 44 Ark., 365.

III.

Permit us in closing to make a few remarks on the effects of the establishment of the Courts within the Indian Territory.

In the treaties of 1866 the United States had stipulated that Congress should have the power to establish Courts within the several Indian Reservations. A generation had passed, and no Court having been established, men began to look upon the absence of local law as a vested right.

When Judge Shackelford convened his first Court he was brought face to face with problems of the gravest and most complicated nature. The only guidance given him by act of Congress was the adoption of the forms of procedure in force in Arkansas. The "contracted obligations" to be enforced arose under the laws of Kansas, Texas, Arkansas and Missouri. Citizens of the United States asked the enforcement of contracts with Indians who lived under their own laws and private customs. Married women—wives of citizens of the United States and citizens of the several Indian Tribes—had contracted obligations and acquired property. Whites, living by sufferance in the several reservations, had one rule of property governing descent and distribution, and Indians had another. The Court was established to bring order out of chaos

—no rules of property were prescribed, and the Judge was expected to walk upon the troubled waters with directions only to say: Peace, be still!

The Judge has, of course, erred at times in matters of law and the exercise of judgment—yet with an earnest desire to do justice he has brought order out of chaos, and the enforcement of law in the Indian Territory is as prompt and as respected as in any state in the Union. He has favored neither creditor nor debtor—he has favored neither resident nor non-resident—red man nor white man. But he has insisted that every man who came in his Court should do justice and should have justice. No higher compliment could be paid to the wisdom of Congress in establishing this Court and the vigor of Judge Shackelford in enforcing the laws than the fact that the people of the Territory, white man and red man, recognize the Court as the protector of the rights of all and the enemy only of the wrong-doer.

The primary object of the law has been accomplished. Dishonest debtors who enjoyed their ill-gotten gains have been forced to pay their debts. A new order of things has been established there. And the only men who stand here protesting against this law assert no defense and plead no equities, but appeal only to the technical rules of construction of that law which they have so long escaped and defied.

~~L. P. SANDELS.~~
~~J. M. HILL.~~
~~W. T. HUTCHINGS.~~
~~For Defendants in Error.~~

Leonidas P. Sandels
Joseph M. Hill
William T. Hutchings
For Defendants in Error

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CLERK

IN THE

Supreme Court of the United States.

No. 220.

WILSON N. JONES, PLAINTIFF IN ERROR,

against

ADOLPH BAER ET AL., DEFENDANTS IN ERROR.

In Error to the United States Court for the Indian Territory.

ADDITIONAL BRIEF FOR DEFENDANTS IN ERROR.

DAVID GOLDSMITH,
LEONIDAS P. SANDELS,
JOSEPH M. HILL,
WILLIAM T. HUTCHINGS,
For Defendants in Error.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C.

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Not having had the brief of counsel for plaintiff in error before us when our former brief was prepared, we beg leave to submit the following additional brief in reply:

I.

It is contended that the demurrer should have been sustained to the complaint, because the complaint alleges that the plaintiffs were residents, instead of alleging that they were citizens of the State of Missouri.

The act of Congress conferring jurisdiction on the court in the Indian Territory does not render necessary those allegations of diverse citizenship, which are assential to give the circuit courts of the United States jurisdiction. The part of the act in reference thereto reads as follows:

"SECTION 6. That the court hereby established shall have jurisdiction in all civil cases between citizens of the United States, who are residents of the Indian Territory, or between citizens of the United States, or of any State or Ter-

ritory therein, and any citizen of, or person or persons, residing or found in the Indian Territory, and where the value or thing in controversy, or damages or money claimed, shall amount to one hundred dollars or more: *Provided*, That nothing herein contained shall be so construed as to give the court jurisdiction over controversies between persons of Indian blood only." (Statutes '89, p. 784.)

The jurisdiction intended is broader than would follow from a literal or strict construction of this section. There is a further provision in this section of the act (quoted at large on page 5 of the brief for the plaintiff in error), which authorizes the issue of writs of attachment "*for like causes* as now provided by the laws of the State" of Arkansas. The laws of that State provide for the issue of such writs on the ground that the defendant is a non-resident (Statutes of Arkansas, 1884, sec. 309). This clearly removes the only limitation made by section 6 in regard to parties defendant, to wit, a limitation in favor of non-residents not found in the Territory, and certainly favors a liberal construction as to the parties plaintiff also. Moreover, the clause which designates who may be plaintiff is vague. It includes as possible plaintiffs "citizens of the United States or of any State or Territory therein." The latter part, namely, the words "or of any State or Territory therein," should clearly be held to have some force, and therefore to include a class not embraced in "citizens of the United States." But how can any one not a citizen of the United States be a citizen of a State or Territory?

The meat of the whole clause is in the proviso. It was intended, subject to the limitation in amount, to give the court provided for jurisdiction over every civil suit except controversies between the Indians, whose right to trial in their tribal courts for controversies and crimes among themselves is guaranteed by many treaties.

That this was the legislative intent is even more clearly shown in the act amendatory of this one:

"That the court established by said act shall, in addition to the jurisdiction conferred thereon by said act, have and exercise within the limits of the Indian Territory jurisdiction in all civil cases in the Indian Territory, except cases over which the tribal courts have exclusive jurisdiction."

Act May 2, 1890, section 29.

It is beyond controversy that, in order to give a Federal court—using the term in a proper sense—jurisdiction, it is essential that the jurisdictional facts should affirmatively appear. The rulings in this regard are based upon the limited character of the judicial powers of the court, and are due to the fact that the Constitution expressly prescribes their jurisdiction, and to a desire to limit them thereto. In consequence it has been held that even the constitutional restriction of the jurisdiction to a case of diverse citizenship is a limitation of jurisdiction over subject-matter, and not merely over the persons of the parties, and that an objection to an insufficient showing even in that regard cannot be waived, but may be raised at any stage of the proceeding.

But neither the policy which dictated these rulings, nor the principle upon which they are based, is applicable to the case in hand. Territorial courts do not derive their powers directly under, and are not subject to the limitations prescribed by, the Federal Constitution. They are not in general, nor is the court established by the act in question, courts of special jurisdiction. They are courts of general jurisdiction, and the only courts of that character in their Territories. They are not even "courts of the United States" in the proper acceptation of that phrase.

American Ins. Co. *vs.* Canter, 1 Pet., 511, 546.
Benner *vs.* Porter, 9 How. (See p. 242.)
Clinton *vs.* Englebrecht, 13 Wall., 434.
Hornbuckle *vs.* Toombs, 18 Wall., pp. 655, 656.
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Good *vs.* Martin, 95 U. S. (See p. 98.)

Says this Court in Hornbuckle *vs.* Toombs, *supra* (18 Wall., pp. 655, 656):

"The jurisdiction of the territorial courts is collectively coextensive with and correspondent to that of the State courts—a very different jurisdiction from that exercised by the circuit and district courts of the United States. In fine, the territorial, like the State courts, are invested with plenary municipal jurisdiction."

The jurisdiction of the court in question in this case, like that of every other court of general jurisdiction, is therefore to be presumed when the contrary does not appear.

The exceptions to its jurisdiction are privileges which can be waived, and they are waived by a general appearance without objection.

Indeed, it has been so held with regard to restrictions on the Federal jurisdiction imposed by Congress beyond the constitutional limitations, as, for instance, with regard to the prohibition in section 11 of the judiciary act of 1789 against the institution of suit in any other district than that in which the defendant resided or was found, or in the much more recent provision that suits should be brought only in the district of his residence.

Gracie *vs.* Palmer, 8 Wheat., 699.
Harrison *vs.* Rowan, 1 Pet. C. C., 489.
Consol. Store Service Co. *vs.* Lamson, &c., Co., 41 Fed. Rep., 833.
Jewett *vs.* Bradford, &c., Co., 45 Fed. Rep., 801.

But the record in this cause sufficiently shows jurisdiction, even if the strict rule which obtains with reference to the constitutional jurisdiction of Federal courts were applicable. In such cases it suffices if the jurisdictional facts, though not stated in the petition, appear from the entire record.

Gordon *vs.* Third Nat. Bank, 144 U. S., 97.
Denny *vs.* Pironi, 141 U. S., 121.

Now, in this cause the petition or complaint names the plaintiffs and mentions them as "doing business in the firm name and style of Baer, Seasongood & Co., at St. Louis, Mo., and residents of St. Louis, Mo." (Transcript, top p. 2). The account filed with this complaint and referred to therein for particulars shows that the plaintiff in error purchased the goods sued for from Baer, Seasongood & Co., of 616 Locust street, St. Louis, Mo., and that these purchases covered a period commencing September 22, 1882, nearly seven years before the institution of this suit.

These facts, we submit, sufficiently show the requisite citizenship of the plaintiffs in the absence of any objection on that head, and more especially since the defendant does affirmatively in his answer deny the jurisdiction on the ground that he is an Indian, and that he resided in Indian Territory at the time the indebtedness sued for was contracted, and has ever since resided there. (Printed Transcript, top p. 7.)

"It is true there is no direct averment to this effect (that the parties plaintiff and defendant were citizens of different States), but it is a necessary consequence of the facts stated in the pleadings that the parties to the suit were citizens of different States. The averment that the plaintiffs were a firm of natural persons, associated together for the purpose of carrying on the banking business in Omaha, and had been for a period of eighteen months engaged in said business at said place, is equivalent to saying they had their domicile there. In this country people usually live and have their citizenship in the place where they do business."

Express Company *vs.* Kountze Brothers, 8 Wall., p. 351.

Moreover, this Court has said in Shelton *vs.* Tiffen, 6 How., p. 185:

"Where an individual has resided in a State for a considerable time, being engaged in the prosecution of business, he

may be presumed to be a citizen of such State, unless the contrary appear."

It is submitted that this case falls squarely within that presumption.

II.

It is contended that the demurrer should not have been sustained because the first paragraph of the answer presents a good defense. That paragraph is:

"The defendant, W. N. Jones, for answer to the complaint of plaintiffs, Baer, Seasongood & Co., denies that he is indebted to plaintiffs in the sum of $2,614.19 or any other sum whatever." (Tr., p. 12.)

The form of denial given by Stephens for a good common-law plea of *nil debit* is:

"And says he does not owe the said sum of money above demanded, or any part thereof, in the manner and form, etc."
Stephens on Pleadings, p. 169.

Evidently paragraph one is an excellent plea of *nil debit*, and is nothing more. Under the Arkansas pleadings, in force in the Indian Territory, the plea is bad on demurrer.

Clark *vs.* Gramling, 55 Ark., p. 525.
Shirk *vs.* Williamson, 50 Ark., p. 562.
Heicht *vs.* Caughron, 46 Ark., p. 132.
Lawrence *vs.* Myer, 35 Ark., p. 104.
Guynn *vs.* McCauley, 32 Ark., p. 97.

III.

In regard to the contention of the plaintiff in error that the law under consideration should not be given a retroactive effect, and that therefore debts created before its passage are not enforcible in the court established by it, we have

but little to add to what we have already said in the brief heretofore filed by us.

It appears to us to be altogether erroneous to treat that act as retroactive or retrospective, because it establishes a tribunal for the enforcement of existing causes of action. To our mind that term should only be applied to a statute which alters the effect of a past transaction, or, in other words, affects an existing right; but we are not disposed to quarrel about terms. Statutes which provide remedies merely for rights are, unless a contrary intent appears, always held to apply to existing rights, and in the present case the statute was passed for the express purpose of providing such a remedy. (Endlich on the Interpretation of Statutes, sections 285, 286, and 287, and authorities cited under latter section, including Sampeyreac *vs.* United States, 7 Pet., 222.)

IV.

We submit, in conclusion, that there is nothing in the act of Congress under consideration, which justifies the claim advanced that the statute of Arkansas in regard to the limitation of actions is applicable to suits in Indian Territory. The statute of limitations of that State is not a part of the practice, pleadings, and forms of proceeding in that State, and therefore is not imported into the Territory by the provision of section 6, that "the practice, pleadings, and forms of proceeding in civil causes shall conform as near as may be to the practice, pleadings, and forms of proceeding existing at the time in like causes in the courts of record of the State of Arkansas." That provision is merely an adaptation of section 914 of the Revised Statutes of the United States, which provides for an assimilation of the practice in Federal courts to that of the tribunals of the State in which they are situated. But, as was said by this Court in *In re* Chateaugay Iron Co., 128 U. S., at page 554:

"The object of § 914 was to assimilate the forms and manner in which parties should present their claims and defenses in the preparation for the trials of suits in the Federal courts to those prevailing in the courts of the State."

The fact that the statutes of limitations of a State govern rights of action prosecuted in the Federal courts is due to the provision of section 721 of the Revised Statutes of the United States, that "the laws of the several States * * * shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply."

McCluny *vs.* Silliman, 3 Pet., 270.
Ross *vs.* Duvall, 13 Pet., 45.

But no counterpart to that provision nor anything analogous thereto will be found in the act under consideration. It is, therefore, entirely unnecessary to add discussion or authority to show that, even if that act had by its language warranted the claim that the statute of limitations of Arkansas governs proceedings in the court established by it, the courts would, nevertheless, have endeavored to avoid a construction of it, which would entail penalties for delay in the enforcement of legal claims, when no means had ever existed for the prosecution of them.

Respectfully submitted.

DAVID GOLDSMITH,
LEONIDAS P. SANDELS,
JOSEPH M. HILL,
WILLIAM T. HUTCHINGS,
For Defendants in Error.